United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

206

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
vs.	)	Nos. 24627 24628
IGNATIUS F. PERRY, Etc., Appellant,	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLANT

A. HARRY BECKER
(Appointed by the Court)

and

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TABLE OF STATUTES AND CASES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. May a police officer invite a citizen to engage in criminal conduct without first having any factual basis for suspecting that the citizen is already engaged in such conduct?

2. If the government fails to produce at trial a witness who materially assisted it in developing its case and who is peculiarly available to it, is the defendant entitled to an instruction as to the inferences the jury may draw from that witness' absence?

3. If the government actively invites and induces a citizen to engage in criminal activity and it is unable to establish the citizen's predisposition to participate in such conduct, is the defendant entitled to a finding of entrapment as a matter of law?

STATEMENT PURSUANT TO GENERAL RULE 8(d)

This case has not previously been before this Court under the same or a similar title.

REFERENCE TO RULING

Ruling that "missing witness" instruction will not be given.

R. 537-539

STATEMENT OF THE CASE

Appellant (hereinafter called Perry) was charged by the Grand Jury, in a fourteen count retyped indictment, with having violated 21 U. S. Code 174 [facilitating the concealment and sale of narcotic drugs], 26 U. S. C. 4704(a) [purchasing, selling, dispensing and distributing narcotic drugs not in or from the original stamped package] and 26 U. S. C. 4705(a) [selling, bartering, exchanging and giving away a narcotic drug, not in pursuance of a written order for that purpose]. Upon the entry of his plea of not guilty to those charges, trial, before a jury, was had thereon. The jury returned verdicts of not guilty to Counts 9, 12, 13 and 14 of the Retyped Indictment and guilty to the remaining Counts thereof. The Court then sentenced Perry to a term of imprisonment upon these convictions. This appeal is taken therefrom.

Carl L. Jackson, an undercover officer of the Bureau of Narcotics and Dangerous Drugs (hereinafter called Jackson) testified that he was working as an undercover agent in Washington, D. C., on April 10, 1969. (R. 1, 4). His sole purpose in coming to Washington was to buy narcotics from Perry. (R. 85). On that day, during a meeting at his office, Jackson met, for the first time, O. L. Williams who was an informer. (R. 55, 56). He was not aware of any criminal record Williams may have had. (R. 56). Williams was paid by the government for working as an informer. (R. 125).

In fact, Williams had been previously arrested for dealing in counterfeit currency and in return for his cooperation in helping the government to develop a case against Perry, a government agent offered to make that fact known to the United States Attorney handling the counterfeiting charge. (R. 425, 427). Such cooperation had been known to lighten sentences or result in probation or charges being dropped. (R. 427, 428).

Jackson and Williams checked into a hotel in Washington on April 10, 1969. (R. 5). Williams telephoned Perry at his office and told Perry that he was with a man from Chicago who wanted to "get a piece of stuff" and that they wanted Perry to come to the hotel. (R. 6, 7). However, Perry insisted that they come to his office, which they did. (R. 7). There, Jackson discussed the purchase of a quantity of cocaine from Perry. (R. 9). All three returned to the hotel where Perry gave Jackson, as a sample, a small glassine bag containing white powder in return for which Jackson paid Perry $75.00. (R. 14). The package was not in a tax stamped package nor was it delivered pursuant to a written order. (R. 14, 15). Thereafter, Jackson gave Perry $1,250.00. (R. 16). Perry left promising to return with the narcotics for which Jackson had paid. (R. 16). Perry returned to the hotel the next morning (April 11, 1969) and gave Jackson two bags containing white powder. (R. 20, 21). Thereafter, Perry never saw Williams again.

On May 6, 1969, after checking into another Washington hotel, Jackson, alone, met with Perry. He asked for two ounces of cocaine and gave Perry $1,250.00. (R. 27, 29, 31, 31). Perry left and later returned with two packages of white powder which he delivered to Jackson. (R. 33, 34).

Jackson saw Perry on May 23, 1969, and asked for heroin since the cocaine Perry had previously sold him was not, according to Jackson, as pure as Perry had represented. (R. 31-34). Thereafter, on June 5, 1969, Jackson checked into a Washington hotel and called Perry who picked him up and the two drove to Perry's office. (R. 40-42). Jackson asked for heroin. (R. 43). They then returned to Jackson's hotel where Perry gave him a sample of heroin for which Jackson paid $100.00. (R. 44). Perry returned the following day and delivered a glassine bag containing white powder to Jackson. (R. 45).

On July 12, 1969, Jackson again checked into a Washington hotel. (R. 48). Perry then arrived and Jackson handed him $1,400.00; Perry left, saying he would return. (R. 50). Jackson then went to Perry's office where he received, from Perry, a piece of aluminum foil containing a white powder. (R. 51, 52). All the substances delivered to Jackson by Perry were identified as narcotic drugs. (R. 369, 371, 374, 376, 378). In no instance were they given by Perry pursuant to a written order

therefor nor did they come from a tax stamped package. (R. 14, 15, 16, 23, 32, 34, 43, 45, 50, 52).

On August 18, 1969, under the authority of an arrest warrant, Perry was taken into custody at his office. (R. 133-136).

Perry, admitted each of the transactions charged in Counts One through Ten of the Retyped Indictment. (R. 494, 495, 497, 501, 503, 512, 516, 523, 536, 545). He interposed a defense of entrapment. (R. 319, 369, 371, 374, 379, 420, 421, 422, 453). He claimed that he was in the real estate business (R. 493); that he made no profits from the transactions (R. 463); that he was never engaged in buying or selling narcotics (R. 463); that he obtained the drugs for Jackson as a favor to him and because Jackson would give him some cocaine (R. 507, 523); that he was a user of cocaine which Agent Jackson saw him "snort" on one occasion (R. 57, 461).

ARGUMENT

I. Police Must Have Reasonable Suspicion Of Prior Criminal Conduct Before Inviting Citizen To Engage In Illegal Activity

Before police authorities may invite one to engage in any particular criminal behavior, they must have a reasonable suspicion that he is already so engaged. Childs vs. U. S. (1959), 105 U. S. App. D. C. 342, 267 F2d 619. See also Morei vs. U. S. (CA 2-1942), 127 F2d 827.

The record in this case is devoid of any facts justifying the government in inviting Perry to become involved in narcotics transactions.

Agent Jackson testified that, at a meeting in the office of the Bureau of Narcotics and Dangerous Drugs, on April 10, 1969, he was given "certain information" about Perry. (R. 4, 5). Jackson never met Perry until later that day. (R. 56). [Jackson never received any background information on Perry (R. 62).] In fact, Jackson had also never met Williams, the informer, until that day. (R. 55, 56). Agent Heneghan testified that he was present at the meeting in the Bureau's office on April 10, 1969, and that plans were made there to investigate Perry. (R. 88). Like Agent Jackson, his first introduction to the informer was on that date. (R. 98). Agent Cooper attended the meeting at the Bureau on April 10, 1969, in reference to the Perry investigation. (R. 100). He had not known the informer before that date. (R. 124). Agent Pope testified that, when the investigation started, it was concerned with "Tony Perry", whom Appellant identified as his brother. (R. 428, 434, 457). Pope learned from the informer that the Messrs. Perry were involved in counterfeit money. (R. 429). Pope monitored a telephone conversation between the informer and Perry "or the person identifying himself as Nick" on the telephone. (R. 429). During the conversation, Pope heard the person identifying himself as Perry ask if the informer would be interested in cocaine. (R. 429, 435). However, the purpose of the call was "to see whether Tony Perry

was engaged in counterfeiting. (R. 434). Pope monitored a second telephone call made by the informer during which an unidentified male answered the phone. (R. 437). Phillip Parham, an office clerk in Perry's office, answered a telephone call from the informer on April 2, 1969, during which the informer asked for Tony Perry. (R. 448), On April 8, 1969, he answered another telephone call from the informer who asked to speak to Tony Perry. (R. 448).

Thus, the record clearly reveals that the government had no factual basis upon which to harbor a reasonable suspicion that Perry was engaged in narcotic activities. Indeed, the government's witness, Pope, testified that its investigation was aimed at Perry's brother in reference to counterfeiting activity. Consequently, Perry submits the government has failed to establish any legitimate bases for inviting Perry, through the use of an informer and undercover agent, to engage in illicit conduct. Having failed to meet the requirement of Childs, supra, it should be prohibited from prosecuting any criminal action against Perry arising therefrom.

II. If Government Fails To Produce Witness Peculiarly Within Its Power To Do So, Defendant Is Entitled To "Missing Witness" Instruction

When a party intends to argue to the jury that it consider the

inference to be drawn from the failure of his opponent to call a witness having important information as to a particular occurrence, an advance ruling should be requested and obtained from the Court, which, if such argument is to be permitted, should instruct the jury as to the conditions under which it may draw the inference. Gass vs. U. S. (1969), 135 U. S. App. D. C. 11, at pp. 19-20, 416 F2d 767. After both sides had rested, Perry requested a "missing witness" instruction as to the informer, Williams. (R. 537). The Court, after listening to argument of counsel, denied the request, stating, only, that his absence had been "explained." (R. 539).

The government first suspected Perry of engaging in criminal activity when so informed by the informer. (R. 427). In January, 1969, (Williams) he had been arrested by federal authorities in Michigan and charged with having engaged in counterfeiting U. S. currency. (R. 427). In return for his cooperation in working for federal authorities, Agent Pope offered to make that fact known to the federal prosecutor handling the counterfeiting charges. (R. 427). Such cooperation had been known to lead to lighter sentences, probation, or cases being dropped. (R. 427, 428). Additionally, Williams had a record of convictions for criminal activity; however, Perry was not allowed to apprise the jury thereof. (R. 543, 544). The informer made calls to Washington, D. C., for the government and was

present at a meeting in an office of the Bureau of Narcotics and Dangerous Drugs on April 10, 1969, that meeting being attended by federal narcotics agents. (R. 87, 88, 429, 435, 437, 448). The informer checked into a Washington hotel with Agent Jackson on April 10, 1969, and made a telephone call from there, in Jackson's presence, to Perry. (R. 6). Jackson testified as to that conversation. (R. 7). Jackson and the informer traveled together to Perry's office. (R. 8). The informer introduced Jackson to Perry. (R. 9). He was present when Jackson and Perry discussed the purchase of cocaine and when Perry delivered a sample and then two bags containing white powder to Jackson. (R. 11, 21).

Perry testified that he had seen Williams a number of times before April 10, 1969, (R. 457); that Williams introduced him to Jackson (R457); that he had met, in Williams' presence, Agent Jackson a few days before April 10, 1969 (R. 459); that, on April 10, 1969, at a meeting in Perry's office, Williams initiated the conversation about drugs (R. 460); that Perry disclaimed to Williams, in Jackson's presence, any knowledge of a source of drugs (R. 461).

Perry had issued a subpoena commanding Williams' presence at trial. (R. 421). The government intended to call him as a witness and advised the jury that it would or might call him as a witness. (R. 83, 423). Approximately one week before trial, the prosecutor was advised that

Williams was in Detroit, but that he had since disappeared. (R. 383). At the time of trial, Williams was on bond in the counterfeiting case. (R. 430, 431). Agent Pope knew Williams' residence address two weeks prior to trial. (R. 431). Williams was peculiarly within the power of the government to produce. Certainly, his testimony would have elucidated the transactions involving Perry. Other than Agent Jackson and Perry, the informer is the only other witness to the transactions involving Perry and certain events leading thereto. Similarly, other than Agents Pope and Jackson, he was the only person who could have testified as to certain telephone conversations involving Perry.

The testimony showed a relationship between the government and the informer which placed it peculiarly within the power of the government to produce him if we are to give any meaning to the idea expressed by the term "peculiarly." "The informer was associated with the government in the development of the case. He participated in bringing appellant into conflict with the narcotic laws. Nothing indicates any break in the association . . . He was a natural witness for the government and clearly was in a position to elucidate the transactions." Burgess vs. U. S. (CADC-1971), No. 21,745, _____ U. S. App. D. C. _____. Of course, the Court may not assume that Williams' testimony would have been merely cumulative. See Burgess, supra. He may well have corroborated Perry's testimony as to

the facts surrounding the initiation of the investigation and given additional support to Perry's defense of entrapment (discussed below). Furthermore, with the real prospect of Williams obtaining some relief from the counterfeiting charges, in return for cooperation with the government in the Perry investigation, Perry should have had an opportunity to test the veracity of Williams' testimony and his motivation in giving it. Thus, the Court erred in finding that Williams' absence had been explained and abused its discretion in refusing to give a "missing witness" instruction.

III. If Criminal Conduct Is Product Of Creative Activity Of Law Enforcement Officials, Plea of Entrapment Is Complete Defense Thereto

"Entrapment occurs only when the criminal conduct was the 'product of the creative activity' of law enforcement officials." Sherman vs. U. S. (1957), 356 U. S. 369, citing Sorrells vs. U. S. (1932), 287 U. S. 435. If entrapment is pleaded as a defense, the defendant must show inducement or active participation by the government; it is then incumbent upon the

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NOTE: Trial of Perry's Co-Defendant, Edward N. Meyers, Crim. No. 1424-69, was conducted June 29-July 2, 1970. Meyers was charged, in a two count indictment, as a principal with Perry in the April 11, 1969, transaction involving Agent Jackson, during which Williams was present. Of particular interest is the fact that Williams was present at Meyers' trial and that Meyers was acquitted on both counts.

prosecution to show predisposition or readiness by the defendant to commit the offense. Hansford vs. U. S. (1963), 112 U. S. App. D. C. 359, 303 F2d 219.

Admitting having taken part in the transactions charged in Counts One through Ten of the Retyped Indictment, Perry interposed a defense of entrapment. (R. 319, 369, 371, 374, 378, 420, 421, 422, 453, 494, 497, 501, 503, 512, 516, 523, 536, 545). The testimony clearly shows inducement and active participation by the government in those transactions. Agent Jackson came to Washington only to induce Perry to sell drugs. (R. 85). The informer, Williams, was induced by Agent Pope to call "Tony Perry" and seek information about criminal activity. (R. 428). On April 10, 1969, Williams, in Jackson's presence, called Perry, stating that he had a man from Chicago who wanted to "get a piece of stuff" and asked Perry to come to their hotel. (R. 6, 7). At Perry's office, Williams told Perry that Jackson wanted to buy drugs. (R. 9). Jackson called Perry from New York City on April 21, 1969. (R. 26). On May 6, 1969, Jackson called Perry and requested to see him. (R. 29, 30). Jackson saw Perry on May 23, 1969, and asked Perry to deliver heroin. (R. 38, 39). On June 5, 1969, Jackson again called Perry and requested to see him. (R. 40, 41). On July 12, 1969, he again called Perry and asked for a quantity of "stuff". (R. 49, 50). On each occasion, Agent

Jackson used government money to purchase drugs from Perry. (R. 6, 16, 27, 32, 37, 50, 54). This Court has ruled that such use of government money is a persuasive factor as to inducement. See Johnson vs. U.S. (1963), 115 U.S. App. D.C. 63, 317 F2d 127.

Having thus shown inducements and active participation by the government, it was then incumbent upon the government to show that Perry was predisposed to commit the offenses.[1/] There is no evidence that Perry was already involved in narcotics activity when he came to the attention of the Bureau of Narcotics and Dangerous Drugs. Agent Pope testified that their investigation was initially aimed at Perry's brother, Tony, whom they learned was possibly involved in counterfeiting. (R. 429). At the first meeting among Williams, Jackson and Perry in the latter's office, either Williams or Jackson initiated the discussion about drugs. (R. 9, 460). Perry claimed that he was in the real estate business and did nothing else. (R. 460, 493). In fact Agent Jackson confirmed that statement. (R. 58). Additionally, a customer of Perry overheard a discussion

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1/ The Record contains "Government's Instruction No. 1" upon which is noted "Granted in substance." Perry submits that the instruction is erroneous because it does not instruct the jury as to the government's burden of proof, once the evidence shows it induced or was creatively involved in the illicit activity, in establishing the defendant's predisposition to commit a crime. Hansford vs. U.S., (supra).

between Perry and Jackson in Perry's office during which Perry insisted he was in the real estate business. (R. 475, 476, 480).

Perry submits that the proof and assessment of his predisposition to engage in illegal narcotics activity must be confined to the facts leading up to and arising out of the April 10, 1969, transaction. If the government does not meet its evidentiary burden in the regard, its prosecution must fail. Otherwise, the government will be tempted and encouraged to use a "shot gun" approach in cases such as Perry's, hoping that its suspicions will somehow and in some manner be confirmed. The government's conduct clearly indicates its ignorance or violation of the fiat of the Supreme Court in Lisbena vs. California (1941), 314 U.S. 219, 237, wherein the Court stated

> If by . . . collusion (and) trickery, . . ., on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law. . .

CONCLUSION

For the foregoing reasons, Perry submits that the convictions

entered herein should be reversed and the case remanded to the United States District Court with an order that it dismiss the Retyped Indictment.

Respectfully submitted,

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Attorney for Appellant
(Appointed by the Court)

HOWARD E. SILBERBERG
Of Counsel

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 24,627 and 24,628

UNITED STATES OF AMERICA, APPELLEE

v.

IGNATIUS F. PERRY, APPELLANT

Appeals from the United States District Court for the District of Columbia

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Cr. No. 1414-69
Cr. No. 1423-69

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether appellant, having volunteered to sell narcotics to federal agents, could complain that he was entrapped merely because his offer was accepted.

II. Whether the trial court erred in refusing to give the missing witness instruction as to the informant.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

IGNATIUS F. PERRY, APPELLANT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In three indictments filed on August 27, 1969, appellant was charged in fifteen counts with violations of the federal narcotics laws (26 U.S.C. § 4704 (a), 26 U.S.C. § 4705 (a), 21 U.S.C. § 174)).[1] On February 13, 1970, the three indictments were consolidated for trial. On March 16, 1970, the case came on for trial before a jury, the Honorable John Lewis Smith, Jr., presiding. On March 19 appellant was found guilty on ten of the four-

[1] In one, Crim. No. 1424-69, appellant was indicted with a co-defendant, Edward N. Meyers. On February 13, 1970, Meyers' case was severed from that of appellant.

teen counts[2] in the retyped indictment, and on July 29 he was sentenced to serve ten years on each of the five § 4705 counts on which he was convicted and two to six years on each of the five § 4704 counts on which he was convicted,[3] the sentences to run concurrently. These appeals followed.

Prior to 1969, O. L. Williams had been convicted of "uttering and publishing" and was sentenced to a term in prison (Tr. 425). In January of 1969 he was arrested in Detroit for counterfeiting. F.B.I. Agent John Pope spoke to Williams at that time about the possibility of Williams' cooperating with federal authorities. Williams agreed to do so on condition that the United States Attorney's Office (presumably for the Eastern District of Michigan, although the record does not so indicate) would be informed of his activities. Agent Pope agreed, and in April of 1969 Williams attempted to call Tony Perry (appellant's brother) in Washington in connection with the subject of counterfeit money (Tr. 426-429). That phone call was monitored by Agent Pope. Tony Perry was not available, and in his absence Williams spoke to appellant. During their conversation appellant brought up the subject of narcotics and asked Williams "if he would be interested in some cocaine" (Tr. 429, 434). Appellant informed Williams that he would do business in quantities of one-eighth of a kilo at a price of $2500 and directed Williams to plan on staying at least a full day if he should come to the District of Columbia to do business (Tr. 435). On April 7 Williams called appellant again. Appellant was not in, but Williams was told by the person on the other end of the phone (whose identity is not disclosed by the record) to come to Washington on April 9 or 10 (Tr. 436-437).

Carl L. Jackson was a Special Agent for the Bureau of

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[2] Count ten of the indictment in Crim. No. 1423-69 was dismissed by the court on March 18, 1970 (Tr. 418).

[3] Appellant was acquitted of all three charges brought under 21 U.S.C. § 174 (counts 9, 12 and 14 of the retyped indictment) and of one of the § 4704 counts (count 13 of the retyped indictment).

Narcotics and Dangerous Drugs. On April 10, 1969, he met with other federal agents and was given background information on appellant. As a result of that meeting he went with O. L. Williams to the Hotel America at Fourteenth Street and Massachusetts Avenue, Northwest. With him he carried $1500 in official government funds. From the hotel Williams called appellant and, in Jackson's presence, said:

> "This is O. L., I am from Detroit. I have my man with me from Chicago and we want to get a piece of stuff." (Tr. 7.)

Appropriate arrangements were made, and in the next twelve hours Jackson purchased from appellant a $75 sample of cocaine and then two ounces of cocaine for which he paid $1250.

After April 10 and 11 Jackson dealt with appellant on three occasions. On none of these occasions was Williams present. On May 6, 1969, Jackson purchased two bags of cocaine for $1250 (Tr. 27-38). On June 5 Jackson purchased a $100 sample of heroin (Tr. 39-47). A month later, on July 12, Jackson made a final purchase of two ounces of heroin for $1400 (Tr. 48-54).[4]

On the basis of these purchases of more than $4,000 worth of narcotic drugs, an arrest warrant for appellant was issued. On August 18 that warrant was executed at appellant's place of business at 470 K Street, Northwest. Appellant was found hiding underneath a desk. Also beneath the desk in plain view were some packages containing 2.9921 grams of white powder, 26.3 per cent of which was heroin (Tr. 138-141, 380).

Appellant took the stand in his own defense. He admitted that he had in fact sold the narcotics in question to Agent Jackson. He denied, however, that he had initiated the conversation concerning narcotics, claiming that he had been asked to obtain the drugs and got them

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[4] Jackson's testimony was broadly corroborated as to time and place by federal agents who kept him and appellant under surveillance during each of these time periods (Tr. 87-125).

merely "as a favor for O. L. Williams" (Tr. 500). Subsequently, he got the drugs for Jackson because he "liked" Jackson (Tr. 507, 523). According to appellant, he obtained the drugs from one Rufus Williams and received nothing in return except a small amount of drugs for his own use, which was given to him first by Williams and next by Jackson. Rufus Williams was now dead (Tr. 458-553).

ARGUMENT

I. Appellant, having volunteered to sell narcotics to federal agents, cannot complain that he was entrapped merely because his offer was accepted.

(Tr. 429, 434-435, 536-537).

Appellant asserts that "the record clearly reveals that the government had no factual basis upon which to harbor a reasonable suspicion that [he] was engaged in narcotic activities" (Br. 7). From this he concludes that the government had no right to invite appellant to engage in illicit narcotics traffic. The problem with the argument is that its factual premise is flatly contradicted by the record.

The government informant, O. L. Williams, who had been arrested for counterfeiting, proposed to contact appellant's brother Tony to secure information on counterfeiting. Tony Perry was unavailable when Williams called, and Williams spoke to appellant only in an attempt to ascertain Tony Perry's whereabouts. During that conversation *appellant* broached the subject of narcotics, asked Williams if he were interested in cocaine and gratuitously informed Williams that he would do business in quantities of ⅛ kilo at a price of $2500 (Tr. 429, 434-435). On those facts no reasonable person could fail to harbor a "reasonable suspicion"[5] that appellant was actively engaged in the business of selling narcotic

[5] *Childs* v. *United States*, 105 U.S. App. D.C. 342, 267 F.2d 619 (1959).

drugs. Those same facts vitiate appellant's final claim (Br. 11-14) that he was entrapped and in fact sold the drugs in question only because he had been "induced" to do so by government officials and agents.[6]

II. The trial court did not err in refusing to give the missing witness instruction as to the informant.

(Tr. 83, 383, 421, 423, 430-431, 537-539)

Appellant argues that the government's failure to produce O. L. Williams at the time of trial required the trial judge, on defense request, to give a missing witness introduction. We disagree.

The record clearly shows that Mr. Williams was under subpoena and was being actively sought by the Bureau of Narcotics and Dangerous Drugs and the Secret Service. Two weeks prior to trial he left the Detroit address at which he resided and, though on bond on a counterfeiting charge in Detroit, completely dropped out of sight (Tr. 83, 383, 421, 423, 430-431, 537-539).

Despite the clarity of the record on this point, appellant, citing *Burgess* v. *United States*,[7] apparently claims that since Williams was a Government informant he was "available" as a matter of law regardless of whether the Government could in fact find him. It is obvious that appellant's argument cannot be sound because, were it true, a missing witness instruction would be appropriate even if the informant were dead. Not surprisingly, *Burgess* does not support that position.[8] If a witness is

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[6] *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932); *Berry* v. *United States*, 116 U.S. App. D.C. 375, 324 F.2d 407 (1963), *cert. denied*, 376 U.S. 959 (1964). Though no transcript of the court's instructions was ordered, the record reflects that the court, at defense request, agreed to give the standard instruction on entrapment (Tr. 536-537). Compare appellant's brief at 13 n.1.

[7] —— U.S. App. D.C. ——, 440 F.2d 226 (1970).

[8] *Id.* at ——, 440 F.2d at 233-234; *cf. Wynn* v. *United States*, 130 U.S. App. D.C. 60, 397 F.2d 621 (1967); *Gass* v. *United States*, 135 U.S. App. D.C. 11, 416 F.2d 767 (1969).

simply not available, he cannot be said to be so merely because of his prior relationship with the Government.[9]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

[9] Appellant notes in his brief that Williams "was present at [the trial of appellant's co-defendant Meyers (Crim. No. 1624-69)] and that Meyers was acquitted on both counts" (Br. 11). That statement is accurate, but we hasten to add that, although found and produced by the Government, Williams was not called by either side to testify in the case.

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